No. 04-1655

In the Supreme Court of the United States

LOUISIANA STATE BOARD OF ELEMENTARY AND SECONDARY EDUCATION, ET AL., PETITIONERS

v.

TRAVIS PACE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

PAUL D. CLEMENT
Solicitor General
Counsel of Record

BRADLEY J. SCHLOZMAN
Acting Assistant Attorney General

JESSICA DUNSAY SILVER
SARAH E. HARRINGTON
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether petitioner is subject to suit for damages for disability discrimination under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794, and for violations of the Individuals with Disabilities Education Act, 20 U.S.C. 1400 *et seq.*, because it waived its Eleventh Amendment immunity when it applied for and accepted federal financial assistance.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 2
Argument 8
Conclusion 24

TABLE OF AUTHORITIES

Cases:

Alden v. *Maine*, 527 U.S. 706 (1999) 12
Arkansas Dep't of Educ. v. *Jim C.*, 533 U.S. 949 (2001) 10
Atascadero State Hosp. v. *Scanlon*, 473 U.S. 234 (1985) 2, 12
Barbour v. *WMATA*, 374 F.3d 1161 (D.C. Cir. 2004), cert. denied, 125 S. Ct. 1591 (2005) 10, 21
Barnes v. *Gorman*, 236 U.S. 181 (2002) 2
Black v. *Cutter Labs.*, 351 U.S. 292 (1956) 9
Board of Educ. v. *Mergens*, 496 U.S. 226 (1990) 16
Board of Trustees of Univ. of Ala. v. *Garrett*, 531 U.S. 356 (2001) 5
Brady v. *United States*, 397 U.S. 742 (1970) 18
Brown v. *North Carolina Div. of Motor Vehicles*, 987 F. Supp. 451 (E.D.N.C. 1997), aff'd, 166 F.3d 698 (4th Cir. 1999), cert. denied, 531 U.S. 1190 (2001) 22
Buckley v. *Valeo*, 424 U.S. 1 (1976) 12
Chandler v. *Lovell*, 537 U.S. 1105 (2003) 10

Cases—Continued: Page

Chevron U.S.A. Inc. v. *NRDC*, 467 U.S. 837 (1984) 9
City of Boerne v. *Flores*, 521 U.S. 507 (1997) 22
College Sav. Bank v. *Florida Prepaid Post-secondary Educ. Expense Bd.*, 527 U.S. 666 (1999) 11, 12, 19
Colorado v. *Spring*, 479 U.S. 564 (1987) 18
Doe v. *Nebraska*, 345 F.3d 593 (8th Cir. 2003) 21
Dolan v. *City of Tigard*, 512 U.S. 374 (1994) 13
Douglas v. *California Dep't of Youth Auth.*, 271 F.3d 812, opinion amended, 271 F.3d 910 (9th Cir. 2001), cert. denied, 536 U.S. 924 10
Ford Motor Co. v. *Department of Treasury*, 323 U.S. 459 (1945) 20
Frost & Frost Trucking Co. v. *Railroad Comm'n*, 271 U.S. 583 (1926) 13
Garcia v. *S.U.N.Y. Health Scis. Ctr.*, 280 F.3d 98 (2d Cir. 2001) 5, 11, 17, 18, 22
Garrett v. *University of Ala. Bd. of Trs.*, 344 F.3d 1288 (11th Cir. 2003) 21
Grove City Coll. v. *Bell*, 465 U.S. 555 (1984) 16
Hawaii v. *Vinson*, 537 U.S. 1104 (2003) 10
Jackson v. *Birmingham Bd. of Educ.*, 125 S. Ct. 1497 (2005) 23
J.E. Riley Inv. Co. v. *Commissioner*, 311 U.S. 55 (1940) 9
Jim C. v. *United States*, 235 F.3d 1079 (8th Cir. 2000), cert. denied, 533 U.S. 949 (2001) 10
Kansas v. *Robinson*, 539 U.S. 926 (2003) 9

Cases—Continued: Page

Kansas v. *United States*, 214 F.3d 1196 (10th Cir.), cert. denied, 531 U.S. 1035 (2000) 17
Koslow v. *Pennsylvania*, 302 F.3d 161 (3d Cir. 2002), cert. denied, 537 U.S. 1232 (2003) 10
Lau v. *Nichols*, 414 U.S. 563 (1974) 16
Lawrence County v. *Lead-Deedwood Sch. Dist. No. 40-1*, 469 U.S. 256 (1985) 15
Litman v. *George Mason Univ.*, 186 F.3d 544 (4th Cir. 1999), cert. denied, 528 U.S. 1181 (2000) 10
Lapides v. *Board of Regents of Univ. Sys.*, 535 U.S. 613 (2002) 20
Lovell v. *Chandler*, 528 U.S. 1181 (2003) .....
M.A. v. *State-Operated Sch. Dist.*, 344 F.3d 335 (3d Cir. 2003) 21
Mathias v. *WorldCom Techs., Inc.*, 5359 U.S. 682 (2002) 9
McClung v. *Silliman*, 19 U.S. (6 Wheat.) 598 (1821) 9
Moran v. *Burbine*, 475 U.S. 412 (1986) 18
New York v. *United States*, 505 U.S. 144 (1992) 13
Nieves-Marquez v. *Commonwealth of Puerto Rico*, 353 F.3d 108 (1st Cir. 2003) 10
Nihiser v. *Ohio EPA*, 979 F. Supp. 1168 (S.D. Ohio 1997), aff'd in part and rev'd in part, 269 F.3d 626 (6th Cir. 2001), cert. denied, 536 U.S. 922 (2002) 22

Cases—Continued: Page

Nihiser v. *Ohio EPA*, 269 F.3d 626 (6th Cir. 2001), cert. denied, 536 U.S. 922 (2002) 10
North Carolina ex rel. Morrow v. *Califano*, 445 F. Supp. 532 (E.D.N.C. 1977), aff'd, 435 U.S. 962 (1978) 17
Ohio EPA v. *Nihiser*, 536 U.S. 922 (2002) 10
Olmstead v. *L.C.*, 527 U.S. 581 (1999) 2
Patterson v. *Illinois*, 487 U.S. 285 (1988) 18
Pederson v. *Louisiana State Univ.*, 213 F.3d 858 (5th Cir. 2000) 5, 10
Pennhurst State Sch. & Hosp. v. *Halderman*, 465 U.S. 89 (1984) 19
Pennsylvania v. *Yeskey*, 524 U.S. 206 (1998) 23
Pennsylvania Dep't of Corr. v. *Koslow*, 537 U.S. 1232 (2003) 10
Petty v. *Tennessee-Missouri Bridge Comm.*, 359 U.S. 275 (1959) 13, 14
Robinson v. *Kansas*, 295 F.3d 1183 (10th Cir. 2002) , cert. denied, 539 U.S. 926 (2003) 10
Sandoval v. *Hagan*, 197 F.3d 484 (11th Cir. 1999), rev'd on other grounds, 532 U.S. 275 (2001) 10
Seminole Tribe v. *Florida*, 517 U.S. 44 (1996) 22
South Dakota v. *Dole*, 483 U.S. 203 (1987) 6, 11, 14, 15, 16
Stanley v. *Litscher*, 213 F.3d 340 (7th Cir. 2000) 10
Steward Mach. Co. v. *Davis*, 301 U.S. 548 (1937) 15, 16

Cases—Continued: Page

Tennessee v. *Lane*, 541 U.S. 509 (2004) 21
Thomas v. *Review Bd. of Ind. Employment Sec. Div.*, 450 U.S. 707 (1981) 12
Williams v. *Norris*, 25 U.S. (12 Wheat.) 117 (1827) 9
WMATA v. *Barbour*, 125 S. Ct. 1591 (2005) 9
Wyman v. *James*, 400 U.S. 309 (1971) 13

Constitution and statutes:

U.S. Const.:
Art. I 13
§ 10 13
Amend. I 13
Amend. XI (Spending Clause) 2, 4, 5, 6, 8, 9, 13, 15, 23
Amend. XXI 14
Americans with Disabilities Act of 1990, 42 U.S.C. 12101 *et seq.* 3, 17
42 U.S.C. 12101(b)(1) 3
Tit. II, 42 U.S.C. 12131-12165 ..... 3, 4, 5, 19, 22, 25
42 U.S.C. 12131-12132 3
Tit. V, 42 U.S.C. 12201 *et seq.*:
42 U.S.C. 12201(b) 19
42 U.S.C. 12202 ..... 3, 19
Civil Rights Act of 1964, Tit. VI, 42 U.S.C. 2000d *et seq* 16
Education Amendments of 1972, Tit. IX, 20 20 U.S.C. 1681 *et seq.* 16
Equal Access Act, 20 U.S.C. 4071 *et seq.* 16

Constitution and statutes—Continued: Page

20 U.S.C. 4071(a) 16

Individuals with Disabilities Education Act, 20 U.S.C. 1400 *et seq.* 3

20 U.S.C 1403 ..... 5, 6, 7, 10

20 U.S.C 1403(a) 3

20 U.S.C. 1412(a) 3

20 U.S.C. 1412(a)(1)(A) 3

20 U.S.C. 1415(f) 3

20 U.S.C. 1415(f)(i) 3

Rehabilitation Act Amendments of 1986, Pub. L. No. 99-506, § 1003, 100 Stat. 1845 (42 U.S.C. 2000d-7) 2, 5, 6, 7, 9, 18, 19

Rehabilitation Act of 1973, 29 U.S.C. 791 *et seq.*:

§ 504, 29 U.S.C. 794 ..... *passim*

§ 504(a), 29 U.S.C. 794(a) 2

28 U.S.C. 2403(a) 4

Miscellaneous:

Restatement (Second) of Contracts (1981) 19

In the Supreme Court of the United States

No. 04-1655

LOUISIANA STATE BOARD OF ELEMENTARY AND SECONDARY EDUCATION, ET AL., PETITIONERS

v.

TRAVIS PACE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the en banc court of appeals (Pet. App. 1-62) is reported at 403 F.3d at 272. The opinion of the panel of the court of appeals (Pet. 63-87) is reported at 325 F.3d 609. The opinions of the district court (Pet. App. 88-97 and 98-114) are unreported.

JURISDICTION

The judgment of the en banc court of appeals was entered on March 8, 2005. The petition for a writ of certiorari was filed on June 6, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

STATEMENT

1. Section 504(a) of the Rehabilitation Act of 1973 prohibits any "program or activity receiving federal financial assistance" from "subject[ing any person] to discrimination" on the basis of disability. 29 U.S.C. 794(a). Individuals have a private right of action for damages against entities that receive federal funds and violate that prohibition. See 29 U.S.C. 794(a); *Barnes* v. *Gorman*, 536 U.S. 181 (2002); *Olmstead* v. *L.C.*, 527 U.S. 581, 590 n.4 (1999).

In 1985, this Court held that the text of Section 504 was not sufficiently clear to evidence Congress's intent to condition federal funding on a waiver of Eleventh Amendment immunity for private damages actions against state entities. See *Atascadero State Hosp.* v. *Scanlon*, 473 U.S. 234, 245-246 (1985). In response to *Atascadero*, Congress enacted 42 U.S.C. 2000d-7 as part of the Rehabilitation Act Amendments of 1986, Pub. L. No. 99-506, § 1003, 100 Stat. 1845. Section 2000d-7 provides, in relevant part:

> (1) A State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of Section 504 of the Rehabilitation Act of 1973 [29 U.S.C. 794].
>
> (2) In a suit against a State for a violation of a statute referred to in paragraph (1), remedies (including remedies both at law and in equity) are available for such a violation to the same extent as such remedies are available for such a violation in the suit against any public or private entity other than a State.

42 U.S.C. 2000d-7(a).

2. The Individuals with Disabilities Education Act (IDEA), 20 U.S.C. 1400 *et seq.*, created a federal grant program that provides billions of dollars to States to educate children with disabilities. In order to qualify for IDEA funding, a State must have "in effect policies and procedures to ensure" that a "free appropriate public education is available to all children with disabilities." 20 U.S.C. 1412(a) and (a)(1)(A). The statute also requires States accepting IDEA funds to provide an administrative process for resolving IDEA disputes and authorizes civil suits in federal court by any party aggrieved by the outcome of an IDEA administrative hearing. See 20 U.S.C. 1415(f) and (f)(i). In 1990, Congress enacted a provision, now codified at 20 U.S.C 1403(a), which provides in pertinent part that a "State shall not be immune under the eleventh amendment to the Constitution of the United States from suit in Federal court for a violation of " the IDEA.

3. In 1990, Congress enacted the Americans with Disabilities Act (ADA), 42 U.S.C. 12101 *et seq.*, to supplement the requirements of Section 504 and to "provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. 12101(b)(1). Title II of the ADA, 42 U.S.C. 12131-12165, addresses discrimination by governmental entities in the operation of public services, programs, and activities. Title II largely tracks Section 504, but applies to every "public entity," regardless of whether it receives federal funding. See 42 U.S.C. 12131-12132. One provision of the ADA abrogates state sovereign immunity to suits for violations of the ADA. 42 U.S.C. 12202.

4. In 1994, at the age of 15, plaintiff Travis Pace enrolled at Bogalusa High School in Louisiana. He is

developmentally delayed, confined to a wheelchair, and suffers from cerebral palsy and bladder incontinence. In March 1997, Pace's mother, believing that her son was being denied a free appropriate public education, requested a due process hearing under the IDEA to address the lack of accessible facilities at the high school and deficiencies in Travis's individualized education plan. The hearing officer found in favor of the school board, and the Louisiana review panel affirmed that decision. Pet. App. 3-4.

5. In 1999, Pace filed suit in federal court against the Bogalusa City School Board, the Louisiana State Board of Elementary and Secondary Education, the Louisiana Department of Education, and the State of Louisiana, alleging violations of Section 504, the IDEA, and Title II of the ADA. The complaint sought damages and injunctive relief. The district court severed Pace's IDEA claims and entered an order affirming the administrative finding that the defendants had not violated the IDEA. Pet. App. 89, 98-114. The district court later granted summary judgment to defendants on Pace's claims under Section 504 and the ADA, concluding that those claims were barred by principles of issue preclusion because the factual basis for those claims was the same as the factual basis for Pace's IDEA claims. *Id.* at 93-94.

6. Pace appealed, and the United States filed an amicus brief in the court of appeals addressing the claims on the merits. On October 10, 2002, the panel hearing the case *sua sponte* ordered the parties to address whether the Eleventh Amendment barred Pace's claims against the State defendants. The United States then intervened pursuant to 28 U.S.C. 2403(a) to defend the constitutionality of the statutory provisions conditioning the

receipt of federal financial assistance on a knowing and voluntary waiver of sovereign immunity.

On March 24, 2003, the panel issued its opinion concluding that the Eleventh Amendment precluded Pace's claims against the state defendants. Pet. App. 63-87. Applying the Circuit's prior decision in *Pederson* v. *Louisiana State University*, 213 F.3d 858 (5th Cir. 2000), the panel concluded that Section 2000d-7 "clearly, unambiguously, and unequivocally conditions a state's receipt of federal * * * funds on its waiver of sovereign immunity." Pet. App. 71. The panel also concluded that, under the IDEA, Section 1403 "constitutes a clear expression of Congress's intent to condition acceptance of federal funds on a state's waiver of sovereign immunity." Pet. App. 74. Nonetheless, the panel found that the State did not knowingly waive its sovereign immunity by applying for and accepting federal funds. Expanding upon the reasoning of *Garcia* v. *S.U.N.Y. Health Sciences Center*, 280 F.3d 98 (2d Cir. 2001), the panel concluded that because at the time of the events underlying this case "the State defendants had little reason to doubt the validity of Congress's asserted abrogation of state sovereign immunity under * * * Title II of the ADA * * *, the State defendants did not and could not know that they retained any sovereign immunity to waive by accepting conditioned federal funds." Pet. App. 73. The panel applied the same reasoning to both Section 504 and the IDEA, concluding that, until the Supreme Court's decision in *Board of Trustees of University of Alabama* v. *Garrett*, 531 U.S. 356 (2001), a state agency could reasonably have believed that Title II of the ADA validly abrogated its immunity and, therefore, could not knowingly have waived its immunity to claims under either Section 504 or the IDEA. Pet. App. 73-76.

7. a. The court of appeals granted the petitions of the United States and Pace for rehearing en banc and vacated the panel's opinion. 339 F.3d 348 (2003). On March 8, 2005, the en banc court issued its decision holding that the state agency defendants knowingly and voluntarily waived their Eleventh Amendment immunity to claims under Section 504 and the IDEA when it accepted IDEA funds, and that Section 504 and the IDEA are valid exercises of Congress's authority under the Spending Clause. Pet. App. 1-31.

Relying on this Court's decision in *South Dakota* v. *Dole*, 483 U.S. 203 (1987), the court held that "congressional spending programs that are enacted in pursuit of the general welfare and unambiguously condition a state's acceptance of federal funds on reasonably related requirements are constitutional *unless* they are either (1) independently prohibited or (2) coercive." Pet. App. 11. The court noted that the State had not disputed that the Spending Clause statutes at issue in this case were "enacted in pursuit of the general welfare" and were "sufficiently related to the federal interest in the program funded." *Id.* at 15. The court proceeded to consider the other requirements for a valid exercise of congressional power under the Spending Clause.

The court held that the conditions on federal spending in Sections 2000d-7 and 1403 are "unambiguous." Pet. App. 18. The court explained that "during the relevant time period, §§ 2000d-7 and 1403 put each state on notice that, by accepting federal money, it was waiving its Eleventh Amendment immunity." Pet. App. 22. The court rejected petitioners' attempt to "engraft[] a subjective intent element onto the otherwise objective Spending Clause waiver inquiry," holding that the fact that a State "might not 'know' subjectively whether it

had any immunity [left] to waive by agreeing to th[e] [statutory] conditions is wholly irrelevant." *Id.* at 22-23. The court concluded that, in light of the unambiguous statutory condition, the State's "waiver of Eleventh Amendment immunity to actions under § 504 and the IDEA was knowing." *Id.* at 24.

The court also held that Sections 2000d-7 and 1403 do not violate any independent constitutional prohibition. The court concluded that those provisions do not violate the "unconstitutional-conditions" doctrine, because States as sovereigns, unlike private parties, have the resources to protect their interests and because in any event the need to protect a State from "coercion or compulsion * * * is subsumed in the non-coercion prong of the *Dole* test." Pet. App. 27. The court also concluded that the conditions in Sections 2000d-7 and 1403 are not unduly coercive. The court noted that, to avoid suit under Section 504 or the IDEA, a "state would not have to refuse all federal assistance." *Id.* at 28. Instead, "[a] state can prevent suits against a particular agency under § 504 by declining federal funds for that agency," and "[a] state can avoid suit under the IDEA merely by refusing IDEA funds." *Ibid.* The court accordingly "refuse[d] to invalidate Louisiana's waiver on coercion grounds." *Ibid.*

Although the court of appeals found that the state defendants were not immune from Pace's IDEA and Section 504 claims, the court agreed with the panel and the district court in affirming the administrative determination that defendants did not violate Pace's rights under the IDEA. Pet. App. 32-34. The en banc court further agreed with the panel and the district court in holding that issue preclusion prevented Pace from pursuing his ADA and Section 504 claims because those

claims "are factually and legally indistinct from his IDEA claims." *Id.* at 49. Thus, the court ultimately affirmed the district court's dismissal of Pace's IDEA, ADA, and Section 504 claims against petitioners.

b. Judge Jones, joined by five other judges, concurred in part and dissented in part. Pet. App. 49-62. She agreed with the majority that the Spending Clause statutes at issue in this case are "not unconstitutionally coercive." *Id.* at 53-54 n.2. But in her view, a State may not be found to have waived its right to sovereign immunity unless it "possess[ed] actual knowledge of the existence of the right or privilege, full understanding of its meaning, and *clear comprehension of the consequences of the waiver*." *Id.* at 55 (internal quotation marks and citation omitted). Adopting the reasoning of the panel decision that she had authored, Judge Jones stated her view that a State could reasonably have believed "between 1996 and 1998 that it had no sovereign immunity to waive" because the ADA had purported to abrogate its immunity to claims under that statute. *Id.* at 57. In her view, although "[t]he State voluntarily accepted federal funds" during that period, the purported abrogation of its immunity to ADA claims meant that "its acceptance [of federal funds] was not a 'knowing' waiver of immunity" to claims under Section 504 and IDEA either. *Ibid.*

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court nor cite any conflict of continuing significance with any other court of appeals. Moreover, petitioners ultimately prevailed in the decision below. Further review is not warranted.

1. As an initial matter, further review is not warranted in this case because petitioners prevailed below. Although the court's decision in petitioners' favor was based on the merits rather than on petitioners' theory of state sovereign immunity (which the court rejected), the court of appeals ultimately affirmed "the district court's dismissal of Pace's claims under the IDEA and * * * Pace's claims for damages and injunctive relief under the ADA and § 504." Pet. App. 49. A ruling from this Court in favor of petitioners on the Eleventh Amendment immunity question would thus have no practical effect on this case or on the judgment ultimately reached. In analogous circumstances, this Court has declined to review decisions at the behest of parties who have obtained a final judgment in their favor in the lower court. See *Mathias* v. *WorldCom Techns., Inc.*, 535 U.S. 682 (2002). The circumstances of this case are not sufficient to overcome the long-established principle that this Court "reviews judgments, not opinions." *Chevron U.S.A. Inc.* v. *NRDC, Inc.*, 467 U.S. 837, 842 (1984); see, *e.g.*, *Black* v. *Cutter Labs.*, 351 U.S. 292, 297 (1956); *J.E. Riley Inv. Co.* v. *Commissioner*, 311 U.S. 55, 59 (1940); *Williams* v. *Norris*, 25 U.S. (12 Wheat.) 117, 120 (1827); *McClung* v. *Silliman*, 19 U.S. (6 Wheat.) 598, 603 (1821).

2. In any event, this Court has frequently denied petitions for certiorari raising arguments indistinguishable from those advanced by petitioners, and there is no reason for a different result in this case. In a number of recent cases, this Court has denied petitions for certiorari challenging the constitutionality of Section 504 of the Rehabilitation Act and of 42 U.S.C. 2000d-7. See *WMATA* v. *Barbour*, 125 S. Ct. 1591 (2005) (No. 04-748); *Kansas* v. *Robinson*, 539 U.S. 926 (2003) (No. 02-1314);

Pennsylvania Dep't of Corr. v. *Koslow*, 537 U.. 1232 (2003) (No. 02-801); *Hawaii* v. *Vinson*, 537 U.S. 1104 (2003) (No. 01-1878); *Chandler* v. *Lovell*, 537 U.S. 1105 (2003) (No. 02-545); *Ohio EPA* v. *Nihiser*, 536 U.S. 922 (2002) (No. 01-1357); *Arkansas Dep't of Educ.* v. *Jim C.*, 533 U.S. 949 (2001) (No. 00-1488). Petitioners do not argue that 20 U.S.C. 1403, which was not at issue in those cases, presents any distinct issue. Accordingly, just as in those cases, further review is not warranted, and the petition should be denied.

Petitioners do not dispute that the language of the relevant statutes makes clear that a state agency may accept federal funds only if the State waives the agency's sovereign immunity against claims under Section 504 and the IDEA.[1] Nor do petitioners contend that

---

[1] The courts of appeals have uniformly held that Section 2000d-7 unambiguously conditions receipt of federal funds on a waiver of Eleventh Amendment immunity. See *Barbour* v. *WMATA*, 374 F.3d 1161 (D.C. Cir. 2004), cert. denied, 125 S. Ct. 1591 (2005); *Nieves-Marquez* v. *Commonwealth of Puerto Rico*, 353 F.3d 108 (1st Cir. 2003); *Koslow* v. *Pennsylvania*, 302 F.3d 161, 172 (3d Cir. 2002), cert. denied, 537 U.S. 1232 (2003); *Robinson* v. *Kansas*, 295 F.3d 1183, 1189-1190 (10th Cir. 2002), cert. denied, 539 U.S. 926 (2003); *Douglas* v. *California Dep't of Youth Auth.*, 271 F.3d 812, 820, opinion amended, 271 F.3d 910 (9th Cir. 2001), cert. denied, 536 U.S. 924 (2002); *Nihiser* v. *Ohio EPA*, 269 F.3d 626, 628 (6th Cir. 2001), cert. denied, 536 U.S. 922 (2002); *Jim C.* v. *United States*, 235 F.3d 1079, 1081 (8th Cir. 2000) (en banc), cert. denied, 533 U.S. 949 (2001); *Pederson* v. *Louisiana State Univ.*, 213 F.3d 858, 875-876 (5th Cir. 2000); *Stanley* v. *Litscher*, 213 F.3d 340, 344 (7th Cir. 2000); *Sandoval* v. *Hagan*, 197 F.3d 484, 493 (11th Cir. 1999), rev'd on other grounds, 532 U.S. 275 (2001); *Litman* v. *George Mason Univ.*, 186 F.3d 544, 553-554 (4th Cir. 1999), cert. denied, 528 U.S. 1181 (2000). Even the Second Circuit, which has concluded that the application of Section 504 to the States was for a time foreclosed because of concerns about notice to the States of their obligations, has not disputed that Section 504 may generally be applied to the States in the future,

the condition Congress has placed on the receipt of federal funds is not "related" to the funds, as required under *South Dakota* v. *Dole*, 483 U.S. 203 (1987). See Pet. App. 15. Rather, petitioners contend that their waiver was invalid because (a) conditioning receipt of federal funds on a waiver of state sovereign immunity violates the "unconstitutional conditions doctrine," (b) the condition imposed is unconstitutionally coercive, and (c) the state was without notice—and the waiver therefore ineffective—because petitioner believed that Congress had already abrogated its immunity to claims under the Americans with Disabilities Act. None of those contentions are correct, and none of them warrant further review.

a. *Unconstitutional conditions*. This Court has repeatedly recognized Congress's authority to condition a State's receipt of federal financial assistance on acceptance of federal conditions, including a waiver of Eleventh Amendment immunity. In *College Savings Bank* v. *Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666 (1999), the Court explained that "a waiver [of immunity] may be found in a State's acceptance of a federal grant." *Id.* at 678-679 n.2. This Court further made clear that its recent sovereign immunity cases have done nothing to undermine well-settled authority under which Congress may condition federal "gifts," such as federal financial assistance, on a State's waiver of sovereign immunity. See *id.* at 686-687; see

---

now that those concerns have dissipated. See *Garcia* v. *S.U.N.Y. Health Scis. Ctr.*, 280 F.3d 98, 113-115 (2001). The dissenting judges in this case similarly concluded that, beginning in 2001, States that accepted federal funds waived their immunity to claims under Section 504 and IDEA. See Pet. App. 57 n.6; see also *id.* at 62 (State did not waive its immunity "during a narrow period of time").

also *Alden* v. *Maine*, 527 U.S. 706, 755 (1999); *Atascadero State Hosp.* v. *Scanlon*, 473 U.S. 234, 247 (1985).

Petitioners argue (Pet. 8) that "this Court has never ruled on" whether Congress may condition the receipt of federal funds on a State's waiver of its sovereign immunity, leaving lower courts to rely on what petitioners argue (Pet. 14) is "*obiter dicta* in *Alden* * * * and *College Savings Bank* * * * in concluding that Congress can condition federal financial assistance upon a waiver of sovereign immunity." The courts of appeals, however, have uniformly concluded that Congress does indeed have the power to attach such a condition to federal spending programs. No court of appeals—indeed, none of the appellate judges (including the dissenting judges in this case) who have questioned the applicability of Section 504 to the States on other grounds—has suggested that either Section 504 or the IDEA is invalid as applied to the States because they conflict with this Court's unconstitutional conditions cases. See Pet. 11 n.25 (citing appellate cases upholding Section 504 and dissenting opinions).[2]

---

[2] Petitioner contends that, under the unconstitutional conditions doctrine, "a person may not be compelled to choose between the exercise of a [constitutional] right and participation in an otherwise available public program." Pet. 15 (quoting *Thomas* v. *Review Bd. of the Ind. Employment Sec. Div.*, 450 U.S. 707, 716 (1981)). But sovereign immunity is an immunity, not a right, and the doctrines specifically addressing the waiver of such immunity, rather than the unconstitutional conditions doctrine, clearly govern here. See also note 3, *infra*. In any event, the unconstitutional conditions doctrine does not provide that Congress may *never* condition a benefit on the waiver of a constitutional right. See, *e.g.*, *Buckley* v. *Valeo*, 424 U.S. 1 (1976) (per curiam) (federal government may condition federal money to candidates who comply with spending limits even if First Amendment protects right to spend unlimited amounts on campaign); *Wyman* v.

Even aside from *Alden* and *College Savings Bank*, this Court has expressly addressed the validity of conditioning federal funds on a waiver of sovereign immunity.[3] In *Petty* v. *Tennessee-Missouri Bridge Commission*, 359 U.S. 275 (1959), for example, this Court held that Congress could condition its grant of a gratuity under one of its Article I powers on the States' agreement to waive their Eleventh Amendment immunity from suit. *Petty* involved two States that desired to enter a compact to create a bi-state agency to build bridges and operate a ferry service. Under the Constitution, Congress must consent to such compacts. See U.S. Const. Art. I, § 10. Congress agreed to authorize the compact, but only if the States agreed to accept a provision that would authorize federal courts to have jurisdiction over claims against the bi-state agency. The States agreed. The Court explained that the "question here is whether Tennessee and Missouri have waived their immunity under the facts of this case," and held that they had because

---

James, 400 U.S. 309, 317-318 (1971) (State may condition welfare benefits on individual's consent to inspection of home without probable cause). Instead, the doctrine provides that "the government may not require a person to give up a constitutional right * * * in exchange for a discretionary benefit conferred by the government *where the benefit sought has little or no relationship to the [right]*." *Dolan* v. *City of Tigard*, 512 U.S. 374, 385 (1994) (emphasis added). Petitioners do not challenge the satisfaction of that "relatedness" requirement in this case.

[3] The "unconstitutional conditions" doctrine was developed in light of the potentially coercive relationship between a government and individual citizens dependent on certain government "privileges" for daily living. See *Frost & Frost Trucking Co.* v. *Railroad Comm'n*, 271 U.S. 583, 593 (1926). The relationship between sovereigns is of a different nature, and States are protected against federal coercion by other doctrines. See, *e.g.*, *New York* v. *United States*, 505 U.S. 144 (1992).

"[t]he States who are parties to the compact by accepting it and acting under it assume the conditions that Congress under the Constitution attached." 359 U.S. at 277, 281-282. *Petty* could not have come out the same way if, as petitioner contends, Congress can never require a State to waive the immunity of one of its agencies in exchange for a federal benefit.

Moreover, the Court assumed in *Dole* that the Twenty-First Amendment vested the States with sole authority to set the drinking age. 483 U.S. at 209. But the Court explained that the vesting of that authority in the States did not prevent Congress from attempting to influence the States' exercise of their authority through an offer or withdrawal of federal funds:

> [Our] cases establish that the "independent constitutional bar" limitation on the spending power is not, as petitioner suggests, a prohibition on the indirect achievement of objectives which Congress is not empowered to achieve directly. Instead, we think that the language in our earlier opinions stands for the unexceptionable proposition that the power may not be used to induce the States to engage in activities that would themselves be unconstitutional. Thus, for example, a grant of federal funds conditioned on invidiously discriminatory state action or the infliction of cruel and unusual punishment would be an illegitimate exercise of the Congress' broad spending power. But no such claim can be or is made here. Were South Dakota to succumb to the blandishments offered by Congress and raise its drinking age to 21, the State's action in so doing would not violate the constitutional rights of anyone.

Id. at 210-211 (quoting *Lawrence County* v. *Lead-Deadwood Sch. Dist. No. 40-1*, 469 U.S. 256, 270 (1985).

b. *Coercion.* In the alternative, petitioners argue (Pet. 18-25) that the conditions Congress placed upon the receipt of federal education funds by enacting Section 504 and the IDEA are unconstitutionally coercive. Although petitioners claim that the courts of appeals have adopted varying approaches to determining whether federal Spending Clause statutes are unconstitutionally coercive, the differences are largely ones of verbal formulation rather than real substance. Petitioners do not cite a single case in which a court of appeals has applied the coercion test to invalidate *any* federal statute, let alone one of the statutes at issue in this case.

This Court noted in *Dole* that its "decisions have recognized that in some circumstances the financial inducement offered by Congress might be so coercive as to pass the point at which 'pressure turns into compulsion.'" 483 U.S. at 211 (quoting *Steward Mach. Co.* v. *Davis*, 301 U.S. 548, 590 (1937)). In *Steward Machine* itself, however, the Court expressed doubt about the viability of such a theory. 301 U.S. at 590 (finding no undue influence even "assum[ing] that such a concept can ever be applied with fitness to the relations between state and nation"). Moreover, the Court in *Dole* also recognized that every congressional spending statute "is in some measure a temptation." *Dole*, 483 U.S. at 211. As the Court explained, however, "to hold that motive or temptation is equivalent to coercion is to plunge the law in endless difficulties." *Ibid.* In *Dole*, the Court reaffirmed the assumption, founded on "a robust common sense," that the States voluntarily exercise their power of choice when they accept or decline the conditions at-

tached to the receipt of federal funds. *Ibid.* (quoting *Steward Mach.*, 301 U.S. at 590).

Petitioners argue (Pet. 22) that the State would have to elect not to seek federal funds for its entire Department of Education if it wishes that agency to be free of Section 504's obligation not to discriminate and attendant waiver of immunity. This Court, however, has upheld Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d *et seq.*, and Title IX of the Education Amendments of 1972, 20 U.S.C. 1681 *et seq.*, against similar attacks in *Lau* v. *Nichols*, 414 U.S. 563, 569 (1974), and *Grove City College* v. *Bell*, 465 U.S. 555, 575-576 (1984). The same rationale applies here. Moreover, this Court has upheld the validity of the Equal Access Act, 20 U.S.C. 4071 *et seq.*, which prohibits any public secondary school that receives any federal financial assistance and maintains a "limited open forum" from denying "equal access" to students based on the content of their speech. 20 U.S.C. 4071(a). In interpreting the scope of the Act in *Board of Education* v. *Mergens*, 496 U.S. 226 (1990), the Court rejected the school district's argument that the Act as interpreted unduly hindered local control, explaining that

> because the Act applies only to public secondary schools that receive federal financial assistance, a school district seeking to escape the statute's obligations could simply forgo federal funding. Although we do not doubt that in some cases this may be an unrealistic option, * * * [complying with the Act] is the price a federally funded school must pay if it opens its facilities to noncurriculum-related student groups.

Id. at 241 (citation omitted).

Similarly, compliance with Section 504 and waiver of the State's sovereign immunity with respect to claims brought against a particular agency is the price that agency must pay if it elects to remain federally funded. See *North Carolina ex rel. Morrow* v. *Califano*, 445 F. Supp. 532, 536 (E.D.N.C. 1977) (three-judge court) (threat of exclusion from 40 federal spending programs unless State enacts particular legislation not "'coercive' in the constitutional sense"), aff'd mem., 435 U.S. 962 (1978); see also *Kansas* v. *United States*, 214 F.3d 1196, 1203-1204 (10th Cir.) ("In this context, a difficult choice remains a choice, and a tempting offer is still but an offer. If Kansas finds the * * * requirements so disagreeable, it is ultimately free to reject both the conditions and the funding, no matter how hard that choice may be. Put more simply, Kansas' options have been increased, not constrained, by the offer of more federal dollars.") (citation omitted), cert. denied, 531 U.S. 1035 (2000). In addition, the State's ability to define and allocate the functions of its state agencies, and thereby to limit the scope of the waiver when it accepts federal funds under Section 504 or the IDEA, minimizes the threat of coercion. See Pet. App. 28.

c. *Subjective knowledge.* Petitioners argue (Pet. 25-29) that the State's waiver of immunity to suits under Section 504 was not knowing—and therefore ineffective—because petitioners believed that Congress had already abrogated the State's immunity to claims under a different law—Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. 12131 *et seq.* Petitioners rely on the Second Circuit's decision in *Garcia* v. *S.U.N.Y. Health Sciences Center*, 280 F.3d 98 (2001), which held that a state agency's acceptance of clearly-conditioned funds "alone is not sufficient" to waive immunity. *Id.* at

113-114. Under *Garcia*, the question is whether the state agency "believed" the waiver would have any practical impact. *Id.* at 115 n.5. The court in *Garcia* reasoned that, because the "proscriptions of Title II [of the ADA] and § 504 are virtually identical, a state accepting conditioned federal funds could not have understood that in doing so it was actually abandoning its sovereign immunity from private damages suits [under Section 504], * * * since by all reasonable appearances state sovereign immunity had already been lost [to claims under Title II]." *Id.* at 114 (citation omitted). Further review is not warranted to consider petitioner's *Garcia*-based argument.

(*i*) The court of appeals correctly rejected petitioner's claim. As in other contexts, what must be known for a valid waiver of sovereign immunity to claims under Section 504 is the existence of the legal right to be waived and the direct legal consequence of the waiver, not the practical implications or costs of waiving the right.[4] Since the enactment of Section 2000d-7 in 1986, the plain text of that provision has in-

---

[4] See *Colorado* v. *Spring*, 479 U.S. 564, 574 (1987) ("The Constitution does not require that a criminal suspect know and understand every possible consequence of a waiver of the Fifth Amendment privilege."); *Moran* v. *Burbine*, 475 U.S. 412, 421-423 (1986); see also *Patterson* v. *Illinois*, 487 U.S. 285, 294 (1988) (waiver not rendered unknowing simply because a party "lacked a full and complete appreciation of all of the consequences flowing from his waiver") (internal quotation marks omitted); *Brady* v. *United States*, 397 U.S. 742, 757 (1970) ("The rule that a plea must be intelligently made to be valid does not require that a plea be vulnerable to later attack if the defendant did not correctly assess every relevant factor entering into his decision. * * * [A] voluntary plea of guilty intelligently made in the light of the then applicable law does not become vulnerable because later judicial decisions indicate that the plea rested on a faulty premise.").

formed every state agency that acceptance of federal funds constituted a waiver of immunity to suit for violations of Section 504. Even under the theory embraced in *Garcia*, Section 504 validly abrogated the States' immunity from 1986 to 1992 (the ADA's effective date). Neither Section 504 nor Section 2000d-7 was amended or altered by the enactment of Title II of the ADA in 1990, and it has always been clear that plaintiffs could sue under either statute or both statutes. See 42 U.S.C. 12201(b) (preserving existing causes of action); 42 U.S.C. 12202 (ADA provision purporting to abrogate a State's sovereign immunity only to "an action in Federal or State court of competent jurisdiction for a violation of *this chapter*") (emphasis added). A state agency that accepted federal funds thus would have known since 1986 that it was giving up any immunity it might have to suit under Section 504, regardless of whether it believed that its immunity had also been abrogated by a distinct statute—the ADA—that imposed similar substantive obligations. Cf. *Pennhurst State Sch. & Hosp.* v. *Halderman*, 465 U.S. 89, 103 n.12 (1984) (immunity must be assessed on a claim-by-claim basis).

(*ii*) More generally, the Second Circuit in *Garcia* erred in concluding that a State's acceptance of clearly conditioned federal funds may be insufficient to support a finding that the State has waived its immunity. Under this Court's precedents, the existence of a waiver turns on the State's objective manifestation of assent by accepting clearly-conditioned funds. See, *e.g.*, *College Sav. Bank* v. *Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 686 (1999) (holding that "acceptance of the funds entails an agreement" to funding conditions); *id.* at 678-679 n.2 ("[A] waiver may be found in a State's acceptance of a federal grant."); cf. Restatement

(Second) of Contracts §§ 2, 18 (1981) (contractual obligations attach by virtue of manifestation of assent). The State's subjective beliefs about the consequences of its acceptance of funds are not relevant.

Indeed, after the Second Circuit decided *Garcia*, this Court expressly rejected the contention that the validity of a waiver of sovereign immunity turns on an analysis of a State's subjective intentions and beliefs. In *Lapides* v. *Board of Regents of University System*, 535 U.S. 613 (2002), the State of Georgia did not believe that it was actually relinquishing its right to sovereign immunity when it removed the case to federal court because, under Georgia law, the Attorney General of the State lacked authority to waive the State's sovereign immunity. And under *Ford Motor Co.* v. *Department of Treasury*, 323 U.S. 459 (1945), the State asserted, it could reasonably believe that, absent that state law authority, no action by the Attorney General in litigation would constitute a valid waiver of the State's sovereign immunity. See *Lapides*, 535 U.S. at 621-622.[5] Nonetheless, this Court held that the removal of the case to federal court was "a form of voluntary invocation of a federal court's jurisdiction sufficient to waive the State's" immunity. *Id.* at 624. The Court specifically rejected the State's request to examine the State's subjective beliefs and motives in determining whether the State's actions amounted to an unequivocal waiver, explaining that "[m]otives are difficult to evaluate, while jurisdictional rules should be clear." *Id.* at 621.

---

[5] In fact, this portion of the holding in *Ford Motor Co.* was good law until this Court overruled it in *Lapides* itself. See *Lapides*, 535 U.S. at 622-623.

The Second Circuit's requirement that courts engage in the difficult evaluation of a State's subjective beliefs and motives before concluding that the State has waived sovereign immunity is inconsistent with *College Savings Bank* and with this Court's subsequent teaching in *Lapides*. Petitioner's acceptance of clearly conditioned federal funds constituted a waiver, regardless of petitioner's subjective beliefs or its assessment of the value of the immunity it was waiving in light of an abrogation provision in a statute imposing similar substantive obligations.

(*iii*) The Fifth Circuit's decision to follow other courts of appeals in rejecting the *Garcia* rationale does not present a direct or continuing conflict warranting this Court's review.

First, the Second Circuit's decision in *Garcia* predated this Court's decision in *Lapides*. *Lapides* casts such substantial doubt on *Garcia* that review of the *Garcia* rationale in this case, before the Second Circuit has had the opportunity to reconsider its position in light of *Lapides*, would not be warranted. Likewise, the Second Circuit has not had an opportunity to reconsider *Garcia* in light of this Court's decision in *Tennessee* v. *Lane*, 541 U.S. 509 (2004), which, contrary to the holding of *Garcia*, concluded that Title II validly abrogated the States' Eleventh Amendment immunity in at least some of its applications.[6]

---

[6] Since *Garcia* was decided, no other court of appeals to consider the reasoning of *Garcia* has adopted it as law of the circuit. See, *e.g.*, *Barbour* v. *WMATA*, 374 F.3d 1161 (D.C. Cir. 2004), cert. denied, 125 S. Ct. 1591 (2005); *Garrett* v. *University of Ala. Bd. of Trs.*, 344 F.3d 1288, 1293 (11th Cir. 2003); *Doe* v. *Nebraska*, 345 F.3d 593, 601-602 (8th Cir. 2003); *M.A.* v. *State-Operated Sch. Dist.*, 344 F.3d 335, 349-351 (3d Cir. 2003).

Second, there is in any event no direct or continuing conflict between the Second Circuit's decision in *Garcia* and the decision of the court of appeals in this case, because the *Garcia* rule, to the extent it survives *Lapides* and *Lane* at all, is just a transitional rule that has likely already lost any continuing significance. *Garcia* held that the waiver for Section 504 claims was effective before Title II of the ADA went into effect in 1992, but then lost its effectiveness when Title II took effect. The court recognized, however, that the waiver may well have regained its full effectiveness once again at some point in the late 1990's, when it became clear that Congress's attempted abrogation of sovereign immunity in Title II of the ADA was subject to doubt. See *Garcia*, 280 F.3d at 114 n.4 (waiver of immunity to Section 504 claims may become effective again when State had a "colorable basis for the state to suspect" that it had retained its immunity to suit, "because a state deciding to accept the funds would not be ignorant of the fact that it was waiving its possible claim to sovereign immunity").

Under the *Garcia* rationale, the point at which Section 504 waivers of state sovereign immunity would regain their validity likely occurred by 1997. By that time, this Court had decided *Seminole Tribe* v. *Florida*, 517 U.S. 44 (1996), and *City of Boerne* v. *Flores*, 521 U.S. 507 (1997). After *Seminole Tribe*, and even more so in response to *City of Boerne*, States around the country began challenging the validity of Title II's abrogation, and some courts accepted those arguments. See, *e.g.*, *Brown* v. *North Carolina Div. of Motor Vehicles*, 987 F. Supp. 451 (E.D.N.C. 1997), aff'd, 166 F.3d 698 (4th Cir. 1999), cert. denied, 531 U.S. 1190 (2001); *Nihiser* v. *Ohio EPA*, 979 F. Supp. 1168 (S.D. Ohio 1997), aff'd in part and

rev'd in part, 269 F.3d 626 (6th Cir. 2001), cert. denied, 536 U.S. 922 (2002). By March 1998, 33 States—including Louisiana—filed an amicus brief in this Court arguing that City of Boerne made it "doubtful" that Congress could have validly abrogated States' Eleventh Amendment immunity to suits under Title II of ADA. State of Nevada et al. Amicus Brief at 10, *Pennsylvania* v. *Yeskey*, 524 U.S. 206 (1998) (No. 97-634). Accordingly, it appears that the Second Circuit, like the other courts that have addressed the issue, would conclude that a State's waiver of immunity to Section 504 suits is valid for most or all cases currently being litigated and for all cases that will arise in the future. The dispute between the Second Circuit's view and that of the other courts of appeals affects at most any pending Section 504 cases against States seeking monetary damages that arose between the effective date of Title II of the ADA in 1992 and (at the latest) 1997.

(*iv*) Petitioners err in arguing that the court of appeals' determination that the State's waiver of its immunity was knowing and voluntary conflicts with this Court's recent decision in *Jackson* v. *Birmingham Board of Education*, 125 S. Ct. 1497 (2005). The Court held in *Jackson* that recipients of federal funds should have understood that the term "sex discrimination" in Title IX of the Education Amendments of 1992 encompassed retaliation against those who complain of violations. In reaching that conclusion, the Court reiterated the principle that recipients of conditioned federal funds may be subject to suits for damages for conduct in violation of a Spending Clause statute only if the recipients "had adequate notice that they could be liable for the conduct at issue." *Id.* at 1509. The court of appeals faithfully applied that principle in the instant case when

it held that, because the federal funds accepted by petitioners were clearly conditioned upon a waiver of petitioner's immunity, petitioners were on adequate notice that they would not be immune to claims under Section 504 if they accepted federal funds. Thus, the decision of the court of appeals is entirely consistent with the analysis and result in *Jackson*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General

BRADLEY J. SCHLOZMAN
Acting Assistant Attorney General

JESSICA DUNSAY SILVER
SARAH E. HARRINGTON
Attorneys

SEPTEMBER 2005